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No. 94-1453

In The Supreme Court of the United States

October Term, 1995

D. Grant Peacock,
Petitioner,
v.
Jack L. Thomas,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICI CURIAE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Central States Pension Fund

Central States, Southeast and Southwest Areas Pension Fund is a multiemployer defined benefit pension trust fund established in 1955 by affiliates of the International Brotherhood of Teamsters and by various employer associations pursuant to section 302(c)(5) of the Labor Management Relations Act (LMRA). The Pension Fund

is governed by a Board of Trustees consisting of an equal number of union and management appointees (four of each). The trustees are plan fiduciaries within the meaning of Section 3(21)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(21)(A). The Pension Fund is administered for the exclusive benefit of the participants to whom the Trustees owe an undivided duty of loyalty. The purpose of the Pension Fund is to pay retirement and certain other benefits to participants and their beneficiaries who become eligible under the terms of the Central States pension plan. Central States Pension Fund is the largest multiemployer pension plan in the country. *Central States v. Central Transport, Inc.*, 472 U.S. 559, 561, n.1, 105 S.Ct. 2833, 2386, n.1 (1985). Its current assets exceed $12.3 billion and the present value of its liabilities for vested benefits is approximately $14.5 billion. Participating employers contribute to the Pension Fund pursuant to their collective bargaining agreements for work performed by their covered (bargaining unit) employees. The Pension Fund covers 170,000 retirees presently drawing benefits and 220,000 active participants of approximately 5,000 contributing employers.

Central States Health and Welfare Fund

Central States, Southeast and Southwest Areas Health and Welfare Fund was established in 1950. It provides health and welfare benefits to eligible employees of contributing employers that are signatory to collective bargaining agreements with local unions affiliated with the International Brotherhood of Teamsters. Like the Pension Fund, the Health and Welfare Fund is governed by a Board of Trustees consisting of four management and four union-appointed trustees, who are plan fiduciaries within the meaning of ERISA.[1] The Health and Welfare

[1] The two funds are jointly administered under the direction of the same eight-member Board of Trustees. The Funds will hereafter be referred to collectively as Central States or individually as the Pension Fund and the Health and Welfare Fund.

Fund has net assets of more than $130 million and provides benefits to more than 125,000 active participants, as well as over 20,000 retirees and their families.

Interests of Central States

As of July 31, 1995, Central States' in-house legal department had 137 active delinquent contribution litigation files and the Pension Fund had 165 withdrawal liability files. To reduce costs, virtually all delinquent contribution and withdrawal liability litigation is filed in the District Court for the Northern District of Illinois, where Central States has its offices, and is handled by attorneys of Central States' law department. Delinquent contribution suits filed by Central States resulted in collections totalling $11,270,911 in 1993, $15,650,413 in 1994 and $6,402,343 through July 1995. Withdrawal liability cases have resulted in collections totalling $25,687,644 in 1993, $24,732,359 in 1994 and $8,821,887 through July 1995.

In approximately half of the cases filed by Central States, all or part of the balance owed is uncollectible because the employing entity is insolvent. In these cases, Central States invariably attempts to determine whether there are any individuals or entities that may also be responsible for the liability under various "common law" theories, including the piercing the corporate veil involved in this case.[2] If, as the Petitioner contends, these cases are governed by state law, the likelihood of prevailing will significantly decrease because recovery will depend upon the vagaries of state law rather than a uniform federal standard. Further, Central States litigation costs

[2] *See e.g. Central States Pension Fund v. Sloan*, 902 F.2d 593 (7th Cir. 1990) (labor law alter ego theory); *Central States Pension Fund v. Minneapolis Van Co.*, 764 F.Supp. 1289 (N.D. Ill. 1991); *Central States Pension Fund v. Goldstein*, 1995 WL 221848 (N.D. Ill. April 11, 1995) (piercing corporate veil); *Central States Pension Fund v. Central Transport, Inc.*, 1994 WL 692726 (N.D. Ill. Dec. 1, 1994).

will substantially increase because ERISA's fee shifting provision (29 U.S.C. § 1132(g)) will not apply and Central States will be required to retain outside counsel in numerous different states to handle such litigation.

Because all of Central States' assets are used to provide benefits to participants and defray administrative expenses, 29 U.S.C. § 1104, the burden of these additional costs and lost revenue will be borne by participants and beneficiaries in the form of lower benefit payments and eventually, if benefit levels are to be maintained, upon other participating employers. To further the congressional goal of protecting the "soundness and stability of plans with respect to adequate funds to pay promised benefits," 29 U.S.C. § 1001, it is important that a federal forum is available to resolve insider liability cases. Since this case implicates Central States' ability to collect amounts that it is owed, Central States has a significant interest in the result of this case.

SUMMARY OF ARGUMENT

1. Petitioner challenges whether a federal court may impose a judgment on an alter ego of an ERISA judgment debtor by piercing the corporate veil under federal common law. (Question 1.) As a starting proposition, however, there is nothing peculiar about a federal cause of action that involves piercing a corporate veil. Assuming that the federal district court has subject matter jurisdiction over the cause of action, the veil-piercing aspect of the case simply goes to the true identity of the liable entity. Petitioner argues, however, that under the facts of this case this veil piercing is really a state-law question and is, in any event, foreclosed by ERISA's specification of remedies against fiduciaries. But this argument is really just a threshold for Petitioner's Question 2, which attacks federal jurisdiction. Amici are concerned that the jurisdictional question not overshadow and inadvertently obscure critical ERISA questions, such as whether an ERISA plaintiff can plead a federal cause of action against

an alter ego of an ERISA defendant. Petitioner's first argument would sweep away any remedy against an alter ego that is imposed by application of federal common law. Such a ruling would cripple ERISA enforcement by plans like Amici and would invite fraud by alter egos.

In an ERISA plan's action against an employer, the question of who is the employer is a federal question. If the employer has an alter ego, then the alter ego *is* the employer—the same employer—notwithstanding its adoption of an alternate identity. The mechanism for reaching the alter ego is to "pierce the corporate veil," a common law concept. Should federal courts be barred from "federalizing" the common law to answer the underlying federal question? Not under this Court's general precedents. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24, 103 S.Ct. 2841, 2854 n. 26 (1983). So the question is whether, as a matter of federal judicial policy, veil piercing should be treated differently and left as a state law matter. The need for uniform application of ERISA ought to answer that question. The question of the *identity* of the ERISA employer is one of the most common under ERISA, therefore plans should not be forced to deal with the disparate common law rules of the states to answer this question. If the federal courts refuse to consider the question of the true identity of a party who is responsible for an obligation created under federal statute, the courts will be abandoning a large part of the judicial function.

Nor does the fact that ERISA provides remedies against fiduciaries some how trump the federal common law. Petitioner argues that ERISA provides an exclusive veil piercing remedy directly against a fiduciary. This is plainly wrong as there is no veil piercing—no determination that one party is identical to another—involved in ERISA's fiduciary rules. Corporations or individuals may be fiduciaries based on objective criteria. The fact that fiduciaries may also be alter egos for another entity does not

make the ERISA fiduciary rule a veil piercing statute. The alter ego status is independent of the fiduciary status.

In this case, Petitioner was held not to be a direct fiduciary under the fiduciary rules. That is, Petitioner's job did not directly involve acting as a fiduciary. But the corporation was held a fiduciary under those rules, and Petitioner is an alter ego of the corporation. He is thus the same entity, for this case, as the corporation and is liable as the corporate fiduciary. Petitioner's argument to the contrary is perverse—that the fiduciary rules should shield an individual from liability for his fiduciary breach as an alter ego. This is plainly a desperate argument as Petitioner stretches to reach his jurisdictional question, and this Court should reject it.

2. Petitioner's jurisdictional attack must also fail. (Question 2.) The court below held that the district court had "ancillary" jurisdiction over a second lawsuit to collect from the alter ego of the judgment debtor in an earlier action. It held it had inherent jurisdiction over its own judgment and further that the second action arose from the same claim as the original action. Petitioner argues that as a state law action (assuming it wins on Question 1), the second case is an independent cause of action to pierce a corporate veil. Petitioner misstates the cause of action. It is really a cause of action to collect an ERISA liability from a fiduciary. The Petitioner is the true fiduciary not because he directly assumed a fiduciary position, but because he dominated and manipulated the corporation that acted as the direct fiduciary. That Petitioner became the liable fiduciary by virtue of his being an alter ego does not change the nature of the cause of action as an ERISA claim. Thus the district court had original jurisdiction of this case under ERISA and there is no need to invoke ancillary jurisdiction. But in any event the claim against the corporation and that against its alter ego arose out of the same Article III case or controversy and thus easily fit within the court's supplemental jurisdiction under 28 U.S.C. § 1367.

ARGUMENT

I. AN ERISA CAUSE OF ACTION AGAINST AN ALTER EGO OF AN ERISA DEFENDANT MAY EMPLOY FEDERAL COMMON LAW TO PIERCE THE CORPORATE VEIL.

To the extent that Petitioner argues that any action to pierce a corporate veil is a state law cause of action, not subject to federal jurisdiction, Petitioner is plainly wrong. One of the commonest ERISA causes of action, for example, is one brought by an employee benefit plan—such as Central States—to collect contributions owed by an employer under 29 U.S.C. § 1145. Section 1145 makes the contractual duty to contribute to a multiemployer plan a statutory obligation by providing that "[e]very employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall . . . make such contributions in accordance with the terms and conditions of such plan or such agreement." 29 U.S.C. § 1145. Often the employer is a corporation but this is not necessarily so since ERISA defines the term "employer" expansively.

> The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

29 U.S.C. § 1002(5). If it is appropriate to pierce the corporate veil, the individual shareholder is the ERISA "employer" and is obligated under § 1145 to pay the contributions. This is an ERISA cause of action.[3]

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[3] Likewise a participant's claim against the corporate employer for an ERISA benefit may also seek to pierce the corporate veil to reach the corporation's parent. For example, in *Lumpkin v. Envirodyne Industries, Inc.*, 933 F.2d 449 (7th Cir. 1991), the court held that beneficiaries stated an ERISA claim by alleging

> [The] Plans fear that a literal reading of § 1145 would not permit corporate-veil piercing. . . . We do not think this is so. When state law pierces the corporate veil, where the owner is the corporation's alter ego, where state or other relevant federal law makes the owner liable, it is fairly easy to say that the owner *is* the corporation. and that the owner is therefore an "employer" (under ERISA's definition) "who is obligated" (under state or other relevant federal law) "to make contributions to" a pension plan. Indeed, in such case he is an employer *already obligated* to make contributions.

Massachusetts Laborers Health Fund v. Starrett Paving Co., 845 F.2d 23, 26 (1st Cir. 1988). This is not simply a matter of the application of state law to a federal statute, however. In *Nationwide Mutual Insurance Co. v. Darden*, 112 S.Ct. 1344, 1348 (1992), this Court noted that because the ERISA definition of the term "employer" was "completely circular and explains nothing," it was necessary to adopt a common law test based upon "the general common law of agency, rather than . . . the law of any particular State." *Id.* n.3, quoting, *Community for Creative Non-Violence v. Reich*, 490 U.S. 730, 740, 109 S.Ct. 2166, 2173 (1989).

Indeed, in enacting ERISA, Congress intended that "a body of federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26, 103 S.Ct. 2841, 2854 n.26, 77 L.Ed.2d 420 (1983) *quoting* 120 Cong. Rec. 22942 (1974) (remarks of Sen. Javits); accord *Pilot Life Ins. Co. v. Dedreaux*, 481 U.S. 41, 56, 107 S.Ct. 1551, 1558, 95 L.Ed.2d 39 (1987). Thus, when a plan seeks to hold an individual liable under a piercing the corporate veil

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that the corporate veil of the employer should be pierced and the defendant be held liable for unpaid pension benefits.

theory, federal common law principles must control. Certainly the scope of a term defined in a federal statute should not turn upon each State's law.

Petitioner claims, however, that veil piercing is different and should be left to state law. That may be convenient for Petitioner's jurisdictional arguments, but it makes no sense as ERISA policy, nor does it accord with this Court's decisions. A good starting point (but one overlooked by Petitioner) for answering whether federal common law encompasses veil piercing is this Court's decision in *Anderson v. Abbott*, 321 U.S. 349, 64 S.Ct. 531 (1994). In that case plaintiff obtained a judgment against a bank and then sought to collect the balance of the judgment from the bank's stockholders in separate lawsuits. Noting that the corporation (the bank) limited liability by its form, the Court nonetheless held that federal policies could overcome the limitations of this business form.

> It is of course true that Delaware created this corporation. But the question of liability for these assessments is a federal question. The policy underlying a federal statute may not be defeated by such an assertion of state power. . . . But no state may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat the federal policy concerning national banks which Congress has announced.

Anderson, 321 U.S. at 365. But this is precisely what Petitioner asks this Court now to do in an ERISA context. As a general principle Petitioner is wrong, and he makes no case for an ERISA exception. Veil piercing is a federal common law matter where the liability of the corporation is created by federal statute. Federal law, applied by the courts in light of the pertinent legislation, must be used to determine whether one party is in fact *identical* to a party who is directly liable for a federal obligation. For example, the traditional state law test

for piercing the corporate veil has emphasized domination and manipulation of the corporation by the shareholder. But which corporate functions must be dominated and manipulated before the corporate veil will be pierced? In light of the underlying ERISA policies, domination and manipulation of the corporation's relationship with its employees appears to be of special (though by no means exclusive) significance. Focusing upon the party who in reality dominated the employment relationship will further the stated ERISA goal of making the "employer" responsible for contributions and withdrawal liability owed to an employee benefit plan. State law concerning the alter ego or veil piercing doctrine cannot be counted on to be sensitive to these same concerns.

Petitioner's sole real hope for an ERISA exception to federal common law veil piercing rests on some rather spurious reasoning. Petitioner argues that ERISA itself provides a mechanism for piercing the corporate veil by imposing fiduciary liability without regard to corporate form. We presume that Petitioner means to argue that by providing one form of remedy Congress meant to exclude all others not specifically allowed. Petitioner's reasoning is flawed.

ERISA's fiduciary rules have absolutely nothing to do with piercing the corporate veil. The term "fiduciary" is defined in 29 U.S.C. § 1002(21)(A). It is defined objectively and without reference to corporations or their alter egos. Likewise the fiduciary duties specified in 29 U.S.C. § 1104 have nothing to do with piercing a corporate veil. ERISA creates these obligations directly, and provides a direct remedy for their breach pursuant to 29 U.S.C. § 1109. There is not the slightest hint that these rules might by their silence shield a nominal non-fiduciary from liability under another theory. Yet Petitioner would have § 1109 shield individuals from the consequences of their ERISA violations if only they are wise enough to set up a corporate veil—regardless of whether that shield is

palpable or legitimate. No legal principle supports such a strained reading of ERISA.

ERISA provides well-defined causes of action. That certain individuals may be fiduciaries (or employers) and subject to liability under ERISA does not shield them, much less other, non-fiduciary individuals from other ERISA causes of action. Here Petitioner is nominally not a fiduciary (i.e., by virtue of his corporate position and duties). But he is an alter ego of the corporate fiduciary and thus is in his individual right the true (albeit indirect) fiduciary—he stands in the shoes of the corporation. And he is liable on that score under § 1109 just as was the corporation.

II. FEDERAL COURTS HAVE JURISDICTION UNDER ERISA OVER A POST-JUDGMENT LAWSUIT TO IMPOSE ERISA LIABILITY ON AN ALTER EGO OF THE JUDGMENT DEBTOR.

Petitioner's Question 2 asks whether the federal courts have subject matter jurisdiction over an action that seeks to impose liability under ERISA, where the liability was previously reduced to judgment against a corporation, and the plaintiff is now asserting it against an alter ego of the judgment debtor. The court below relied upon federal "ancillary" jurisdiction, which is codified at 28 U.S.C. § 1367 as "supplemental" jurisdiction. That statute permits jurisdiction over claims if they are so related to a claim over which the federal court has original jurisdiction that they form part of the same case or controversy (including claims that involve the joinder of additional parties). Had Petitioner been sued as the employer by virtue of veil piercing as part of the first action, there is no question that the court would have had jurisdiction under § 1367 and under ERISA itself. The only real question is whether the court loses jurisdiction when it enters the first judgment and the alter ego is then sued in a second action. Put that way why should timing of the action be the dispositive factor? The court below

held that the district court had continuing jurisdiction over enforcement of its first judgment and that an action to impose that judgment on an alter ego of the judgment debtor fell within that jurisdiction. Is this, then, jurisdiction under ERISA (as was the original action), or under a court's "inherent" jurisdiction over its judgments, or under ancillary jurisdiction?

Amici curiae believe that this jurisdiction actually stems from the original jurisdiction under ERISA against the corporate fiduciary. There is no cause of action to pierce a corporate veil, but rather a cause of action to impose ERISA liability on a fiduciary (or employer, depending on the ERISA obligation) who happens to be a fiduciary solely because of its status as an alter ego of an entity that was itself held to be a fiduciary. The alter ego allegation is, in a sense, "ancillary" because it adds an element not expressly found in the statute, but this does not make it an ancillary claim for purposes of § 1367. Of course, the ERISA liability had already been established against the corporation. Petitioner is wrong, however, to characterize the second action solely in terms of the alter ego allegations as if this makes it a non-ERISA claim. The alter ego case is still an ERISA claim against the employer/fiduciary—in its individual (rather than corporate) form. The already adjudicated ERISA claim was a necessary element of the action against the alter ego, thus making it an ERISA action.

Petitioner argues that the alter ego action is just a procedural device in aid of execution like a garnishment. That is a false analogy. An alter ego action is one to clarify the *identity* of the judgment debtor for purposes of execution on a judgment. This is obviously a substantive part of the ERISA claim (establishing liability against an entity), not a collection procedure. *See Anderson v. Abbott*, 321 U.S. 349, 64 S.Ct. 531 (1944). In *Anderson*, jurisdiction over the post-judgment action to pierce the corporate veil derived from the federal banking laws.

Likewise ERISA provides the jurisdiction for a post-judgment action to collect ERISA liability from an alter ego.

CONCLUSION

This Court should affirm the court below. Specifically this court should hold that piercing the corporate veil to impose ERISA liability on an alter ego is governed by federal common law. Further the Court should hold that ERISA provides jurisdiction for a post-judgment action against an alter ego of an ERISA judgment debtor because the liability asserted against the alter ego is the same ERISA liability, and the alter ego is (as a matter of federal common law veil piercing) the same ERISA defendant, as the judgment debtor albeit in individual form.

Respectfully submitted,

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